

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

DEC 14 2012

Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

ROBERT E. FALKENSTEIN, JR., PRO SE)
8622 Eagle Glen Terrace)
Fairfax Station, VA 22039,)
703-690-2548 home Plaintiff,)

v.)

SECRETARY SHAUN DONOVAN)
U.S. DEPARTMENT OF HOUSING)
AND URBAN DEVELOPMENT)
451 7th Street SW)
Washington, DC 20410,)
Defendant.)

Case: 1:12-cv-02000

Assigned To : Sullivan, Emmet G.

Assign. Date : 12/14/2012

Description: FOIA/Privacy Act

COMPLAINT

Plaintiff Robert E. Falkenstein, Jr. (Falkenstein) brings this action against the Defendant U.S. Department of Housing and Urban Development to compel compliance with the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), and 28 CFR Part 16 et seq. As grounds therefore, Plaintiff alleges:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.
2. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

PARTIES

3. Plaintiff Falkenstein is a private individual and Federal civil service employee

employed with the Defendant since 1984. The Plaintiff's private residence is located at 8622 Eagle Glen Terrace, Fairfax Station, VA, 22039. Plaintiff seeks to promote high standards of integrity, conduct, and concern for the public interest; transparency; labor/management respect; elimination of Defendant's secrecy regarding unclassified and public records and its personnel actions; elimination of the Defendants' prohibited personnel actions and reprisals; accountability in government; and fidelity to the rule of law.

4. Defendant is an agency of the U.S. Federal Government and is headquartered at 451 7th Street, SW, Washington, DC, 20410. Defendant has possession, custody, and control of records to which the Plaintiff seeks access.

STATEMENT OF FACTS in Reference to FOIA Control No.: 12-FI-HQ-00131

5. On October 18, 2011, Plaintiff submitted via HUD's internet a FOIA request to the Defendant's Office of the Chief Human Capital Officer (OCHCO), seeking access to copies of:

"Provide the National Council of LaRaza's (Agency ID 80758), (and/or its affiliate Centro De Apoyo Familiar (Agency ID 80604), written response, including a timeline and description of proposed or undertaken corrective actions, to a letter sent to it by Ms. Brenda J. Bellisario, Director, Program Support Division, Philadelphia Homeownership Center dated July 1, 2011 regarding a performance review report. In addition, provide any subsequent communication, written or otherwise, from Department of Housing and Urban Development to the National Council of LaRaza and/or Centro De Apoyo in regards to this performance review."

6. By letter dated November 2, 2011, OCHCO (Sandra J. Wright, Lead FOIA Specialist) acknowledged receipt of Plaintiff's Freedom of Information Act (FOIA) request dated October 18, 2011, and received by OCHCO on October 19, 2011 via the Internet. OCHCO's written acknowledgement states that HUD has 20 working days within which to make a determination on the request unless unusual circumstances exist. OCHCO further states that "Based upon HUD's experience and current inventory, it is estimated that it may take

approximately 30 days to complete processing of your (Plaintiff's) request." OCHCO is the HUD office that coordinates, prepares, and dispatches written responses based on public FOIA requests made to the Defendant under FOIA. After the FOIA requestor electronically submits a request via the Internet, this portal to OCHCO does NOT issue an electronic receipt and/or acknowledgement, or in any way iterates or reiterates the written request made by the requestor. However, OCHCO does issue in a letter format an acknowledgement to the FOIA requestor, but does NOT iterate or reiterate the written FOIA request being made by the requestor. Because of this systemic shortcoming in using the Defendant's Internet portal; and lack of an iteration, or a reiteration, of the FOIA request in any of the Defendant's written acknowledgements (either electronically or in letter format); the burden to exact in detail what the FOIA request entails falls on the requestor, and in this case it is the Plaintiff. This systemic shortcoming and lack of iteration or reiteration of the FOIA request are factual points in all of the forthcoming Statements of Facts that are found in this Complaint. In regards to this FOIA request, OCHCO provided the FOIA Control No.: 12-FI-HQ-00131.

7. By email dated Tuesday, December 6, 2011, 9:30 PM, the Plaintiff followed up with OCHCO (Sandra J. Wright and Marie H. Perry) to check the status of the Plaintiff's FOIA request, and requested a date certain that OCHCO would officially reply.

8. By email dated Wednesday, December 7, 2011, 8:56 AM, OCHCO (Marie H. Perry with copy to Sandra J. Wright) responded by stating OCHCO will have a response to the Plaintiff by no later than December 30, 2011. Furthermore, OCHCO stated that if the agency needed additional time that the Plaintiff will be contacted in writing. In regards to this dated event, the Plaintiff has never received a letter from the Defendant as is required by 28 CFR §16.5, Timing of responses to requests, setting forth any "unusual circumstances" and the date

by which processing of the request can be expected to be completed, and a statement that an extension of time by the Defendant was necessary.

9. By email dated Monday, January 6, 2012, 10:05 AM, Plaintiff followed up on OCHCO's email response dated Wednesday, December 7, 2011, 8:56 AM (paragraph 8 above). Once again the Plaintiff stated that more than 20 days had passed since the FOIA request had been made. And, once again Plaintiff requested a date certain that OCHCO would officially respond to the Plaintiff's FOIA request.

10. By email dated Tuesday, January 10, 2012, 12:29 PM, OCHCO (Marie H. Perry) stated that the Defendant needed additional time. OCHCO stated that the program area had gotten back to OCHCO, and OCHCO needed additional time to go over the responsive documents. The FOIA Specialist Marie H. Perry stated that she would try to work the Plaintiff's FOIA request into her current workload. In regards to this dated event, the Plaintiff has never received a letter from the Defendant as is required by 28 CFR §16.5, Timing of responses to requests, setting forth any "unusual circumstances" and the date by which processing of the request can be expected to be completed, and a statement that an extension of time by the Defendant was necessary. The Plaintiff did not hear anything else and/or did not receive any written response either by email or letter from the Defendant until a letter arrived on July 25, 2012 (paragraph 13). During this interim period of time the Plaintiff did dispatch two letters concerning this matter (paragraphs 11 and 12).

11. By letter to HUD Secretary (Shaun Donovan) dated April 15, 2012, Plaintiff provided a written complaint to HUD's Chief Executive Officer (i.e., HUD Secretary) regarding HUD's non-compliance with 5 U.S.C. § 552 as amended in regards to the Plaintiff's FOIA request(s) (12-FI-HQ-00131 and 12-FI-HQ-00136 respectively). Furthermore, the Plaintiff

requested the HUD Secretary to intervene and apprise his (HUD Secretary's) subordinate staff to comply with the provisions found in the Federal FOIA. Plaintiff has never received a response to this letter.

12. By letter to HUD's General Counsel (Helen Kanovsky) dated June 15, 2012, Plaintiff beseeched HUD's highest level U. S. Government attorney in regards to his FOIA request(s) (12-FI-HQ-00131 and 12-FI-HQ-00136 respectively) to OCHCO and asked that she "do what is right under the parameters of 5 U.S.C. § 552(a)(6)(A)(i)." Plaintiff further stated that requests for "expedited" processing in regards to his FOIA request(s) had been made to OCHCO, and stated that HUD's non-compliance with the Federal FOIA in this regard left the Plaintiff with no other alternative but to seek appropriate actions under this provision of law (FOIA), and otherwise. Plaintiff has never received a response to this letter.

13. By letter to Plaintiff dated July 25, 2012, OCHCO provided a response to the Plaintiff's FOIA request (12-FI-HQ-00131). The Plaintiff reviewed the remitted documentation and found that the Defendant had only provided a partial response to his FOIA request (12-FI-HQ-00131). As set forth in this letter, the Defendant withheld private funding and financial statements under FOIA Exemption 4 because certain materials contained privileged and confidential commercial or financial information obtained from a person, which is exempt from disclosure; and, withheld employee names under FOIA Exemption 6, because the release of such information would constitute an unwarranted invasion of privacy. No other exemptions were made by Defendant. With respect to the Plaintiff's original FOIA request (paragraph 5), the Plaintiff discovered a conspicuous absence of the Defendant's final determination letter issued by the program office either accepting or rejecting in whole or part the program participant's (National Council of LaRaza's) response to program performance letter with findings that was

issued to the program participant on July 1, 2011. Based on this conspicuous absence of a critical document the Plaintiff appealed (paragraph 14).

14. By letter to OCHCO dated August 9, 2012, Plaintiff appealed to OCHCO that it did not comply with the Plaintiff's original FOIA request dated October 18, 2011, and that the remitted documentation was incomplete. In this letter the Plaintiff set forth that the Defendant had conspicuously omitted critical documents (including a timeline and description of proposed or untaken corrective actions) that supported the Defendant's final decision (i.e., Headquarters' program office, a/k/a the Program Support Division that is located in the Office of Housing under the direction of the Assistant Secretary for Housing and Federal Housing Administration Commissioner) that is in response to the program participant's (National Council of LaRaza) written response dated December 9, 2011 to a letter dated July 1, 2011 that was issued by the Defendant's local program manager, Ms. Brenda J. Bellisario, Director, Program Support Division, Philadelphia Homeownership Center, regarding a Defendant conducted performance review where handbook, regulatory and statutory findings were found against the program participant (National Council of LaRaza) and needed to be addressed by this organization.

15. By letter to Plaintiff dated August 16, 2012, Defendant's Office of General Counsel (OGC) (Robert Golden, Assistant General Counsel) acknowledged receipt of Plaintiff's appeal made by letter to OCHCO and dated August 9, 2012 (paragraph 14).

16. By letter to Plaintiff dated September 7, 2012, Defendant's OGC (Peter J. Constantine) stated:

"...(excerpt follows)...On July 25, 2012, the Department granted your request in part, only withholding private financial statements and employee names. You have not appealed these withholdings. In your letter, you claim that the response is incomplete due to the fact that the response did not include a final determination letter from HUD that is required by the performance review process. After review, we uphold your appeal.

We contacted the appropriate staff and confirmed that a final determination was sent by the Department to the NCLR on March 20, 2012. The letter was not included in the original response because the program office completed its search and forward documents to the Department's FOIA office on December 16, 2011, before the final determination letter was sent. No further search was conducted prior to your response letter being sent on July 25, 2012. You were never provided a cut-off date that the FOIA office would use to conduct its search until you received your July 25, 2012 response.

Although an agency may employ a cut-off date for searching for responsive documents for a FOIA request, the agency must inform the FOIA requester of that date. See In Def. of Animals v. NIH, 543 F. Supp. 2d 83, 99 (D.D.C. 2008) (finding search inadequate because, inter alia, agency failed to inform plaintiff of date-of-search cut-off date); McGehee v. CIA, 697 F.2d 1095, 1105 (D.C. Cir. 1983). In this case, none of the Department's correspondence indicates a search cut-off date was communicated to you until the final response letter; nor do the Department's regulations contain such a cut-off date. Therefore, the search was inadequate. We are returning your request to the FOIA office to process the additional document. (close excerpt)..."

17. By letter to OCHCO (Dr. Dolores W. Cole, Director for FOIA and Executive Correspondence) dated September 26, 2012 from Plaintiff provided a copy of the letter from Defendant's OGC dated September 7, 2012 (paragraph 16). Plaintiff's letter stated that OCHCO has not responded to the Plaintiff in regards to when it will officially respond with or without "unusual circumstances" to the Plaintiff's original FOIA request as is required by 28 CFR § 16.5(c), or as provided for by 28 CFR § 16.6(c); and remit to the Plaintiff the additional information not provided in the OCHCO's response dated July 25, 2012 (paragraph 13), and referred to in the OGC letter dated September 7, 2012, granting the Plaintiff's appeal (paragraph 16).

18. As to the date of the filing of this Complaint the Plaintiff has NOT received the additional documentation respective to the granted appeal (paragraph 16) from the Defendant in regards to FOIA Control No.: 12-FI-HQ-00131. Furthermore, as is required by 28 CFR § 16.5 the Plaintiff has not received any written notice citing any "unusual circumstances" and of the date by which processing of the request can be expected to be completed; or, as is required by 28

CFR§ 16.6, any written adverse determination that denies the Plaintiff's a request in any respect where the Defendant notifies the Plaintiff of a denial, in whole or part, or the document does not exist, or cannot be located. Based on these facts the Plaintiff takes the position that the FOIA request dated October 18, 2011 is an open and ongoing FOIA request, and that the Defendant is in non-compliance with the 5 U.S.C. § 552 ("FOIA") and 28 CFR Part 16.

19. In conclusion, the Plaintiff is now compelled to seek relief from the COURT.

STATEMENT OF FACTS in Reference to FOIA Control No.: 12-FI-HQ-00136

20. On October 18, 2011, Plaintiff submitted via HUD's internet a FOIA request to the Office of the Chief Human Capital Officer (OCHCO), seeking access to copies of:

"Provide the last two intermediary performance reviews (scheduled and unscheduled), and working papers related to these reviews, performed by the (HUD) Headquarters' program staff (Program Support Division) of the Department of Housing and Urban Development regarding the National Council of LaRaza (Agency ID 80758) to include: a copy of the agency's quality control plan that the agency monitors the performance of its sub-grantees, and any related HUD findings or observations regarding this plan; HUD's (Program Support Division's) review of the agency's quality assurance processes in: (1) selecting affiliates (particularly its sub-grantees receiving funds via a HUD grant) to participate in HUD's Housing Counseling Program and (2) selecting its affiliates in receiving sub-grants from its HUD intermediary housing counseling grant."

21. By letter dated October 28, 2011, OCHCO (Sandra J. Wright, Lead FOIA Specialist) acknowledged receipt of Plaintiff's Freedom of Information Act (FOIA) request dated October 19, 2011, and received on October 20, 2011 via the Internet. OCHCO states that HUD has 20 working days within which to make a determination on the request unless unusual circumstances exist. OCHCO further states that "Based upon HUD's experience and current inventory, it is estimated that it may take approximately 30 days to complete processing of your (Plaintiff's) request." OCHCO is the HUD office that coordinates, prepares, and dispatches written responses based on public requests made to Defendant under FIOA. OCHCO provided

the FOIA Control No.: 12-FI-HQ-00136. The Plaintiff has issues with how the Defendant's OCHCO handles FOIA requests (see paragraph 3).

22. By email on Tuesday, December 6, 2011, 9:27 PM, Plaintiff followed up with OCHCO (Sandra J. Wright and Deidra D. Jenkins) to check the status of the Plaintiff's FOIA request, and requested a date certain that OCHCO would reply.

23. By email on Wednesday, December 7, 2011, 7:34 AM, OCHCO (Deidra D. Jenkins) responded by stating that "the Program Office has a response that has not been provide to the FOIA Branch. I (Ms. Jenkins) will update you once they respond." Plaintiff has never received any update to this email response.

24. By email on Monday, January 9, 2012 Plaintiff followed up with OCHCO (Ms. Jenkins) on his email dated Wednesday, December 7, 2011 (paragraph 22). Plaintiff stated that more than 20 days has passed since filing a FOIA request and asked for a date certain for an official response.

25. By email to Plaintiff dated January 19, 2012 OCHCO responded to paragraph 23. Wherein, Ms. Jenkins states that she had responded to paragraph 24 on January 12, 2012 through OCHCO's FMS2 (an unknown system to the Plaintiff). Purported by Ms. Jenkins the message in FMS2 states: "Mr. Falkenstein with regards to your FOIA request, I have received documents from the program office. I will review these documents on next Tuesday (January 24, 2012) and prepare the response for review/signature." Plaintiff has never received any official response from the Defendant.

26. By letter to HUD Secretary (Shaun Donovan) dated April 15, 2012, Plaintiff formally provided a written complaint to HUD's Chief Executive Officer (i.e., HUD Secretary) regarding HUD's non-compliance with 5 U.S.C. § 552 as amended in regards to the Plaintiff's

FOIA requests (12-FI-HQ-00131 and 12-FI-HQ-00136 respectively). Furthermore, the Plaintiff requested the HUD Secretary to intervene and apprise his (HUD Secretary's) subordinate staff to comply with the provisions found in the Federal FOIA. Plaintiff has never received a response to this letter.

27. By letter to HUD's General Counsel (Helen Kanovsky) dated June 15, 2012, Plaintiff beseeched HUD's highest level Government Attorney in regards to his FOIA request(s) (12-FI-HQ-00131 and 12-FI-HQ-00136 respectively) to OCHCO "to do what is right under the parameters of 5 U.S.C. § 552(a)(6)(A)(i). Plaintiff further stated that a request for "expedited" processing in regards to his FOIA request(s) had been made to OCHCO, and stated that HUD's non-compliance with the Federal FOIA in this regard left the Plaintiff with no other alternative but to seek appropriate actions under this provision of law, and otherwise. Plaintiff has never received a response to this letter.

28. By email on Tuesday, June 26, 2012, 6:42PM, to OCHCO (Ms. Deidra D. Jenkins) Plaintiff states that months have passed and the HUD Secretary had been requested to intervene, but no change in processing status regarding 12-FI-HQ-00136 had occurred. Plaintiff demanded that the official response be forthcoming in the next ten business days.

29. By email to Plaintiff dated June 27, 2012, 8:08 AM, OCHCO, Ms. Deidra D. Jenkins responded to Plaintiff's email (paragraph 28) stating: "Mr. Falkenstein it will be submitted today for review/signature."

30. By letter to OCHCO (Dr. Dolores W. Cole, Director for FOIA and Executive Correspondence) dated September 26, 2012, Plaintiff states that the Defendant has not abided by FOIA and has disregarded its time frame provisions as set forth in 28 CFR Part 16. Plaintiff made a final plea for expedited handling of these documents and requested that Defendant

exercise its responsibilities and duties under the FOIA statutes in a timely fashion. Plaintiff has never received any response to this letter and has never received any response to FOIA Control No.: 12-FI-HQ-00136.

31. By letter to the U. S. Department of Justice (Office of Information Policy – OIP) dated September 26, 2012, Plaintiff filed a complaint regarding the Defendant's cavalier attitude toward complying with 5 U.S.C. § 552 with specifics complaints, and an appeal to acquire documentation requested via this control number, regarding 12-FI-HQ-00136.

32. By letter to the Plaintiff dated December 3, 2012, the U. S. Department of Justice replied stating it would look into this matter and will contact the Plaintiff once it completes its review. The Plaintiff was requested to execute a consent statement and return it to OIP. As has been historically true (in the Plaintiff's opinion after 28 years of employment with the Defendant), the Defendant (i.e., its FOIA office and program areas) will not be held fully accountable for its cavalier attitude towards abiding by the requirements of 5 U.S.C. § 552 and 28 CFR Part 16, respective case law, and its FOIA regulations and procedures; and that the Defendant will continue to receive mild hand slaps from sister Federal agencies in their oversight of the Defendant. The Defendant's compliance the Federal 5 U.S.C. § 552 and similar provisions are only one of the Plaintiff's concerns as there are other examples regarding the Defendant's compliance with OPM, EEOC, and Department of Labor statutes, regulations and requirements. These examples are not the subject of this Complaint, but are representative (in the Plaintiff's opinion) of the Defendant's attitude in its broad scope of compliance with Federal statutes, laws, regulations, labor/management agreements, etc. Frankly, the Plaintiff has more confidence in the U.S. Federal Court System to assure the Defendant's compliance regarding 5 U.S.C. § 552 and 28 CFR Part 16 respective to this Complaint.

33. In conclusion, Plaintiff is now compelled to seek relief from the COURT.

STATEMENT OF FACTS in Reference to an unknown FOIA Control No.

34. On September 26, 2012, Plaintiff submitted via HUD's internet a FOIA request to the Office of the Chief Human Capital Officer (OCHCO), seeking access to copies of:

"This request is in reference to 12-FI-HQ-00136 dated October 28, 2011. Provide all documentation that regards the disposition and delay in completing this FOIA request in a timely and regularly fashion to include, and not limited to, any communiques, emails, forms, documents, opinions (legal or otherwise), etc. that reflects any dialogue, conversations, and/or decisions that justifies, sustains and/or causes the delay (delinquency), such as, HUD officials' elections to invoke HUD's procedures regarding its processing of sensitive FOIA requests."

35. The Defendant did not respond to this FOIA request and acted in an arbitrary and capricious manner in not acknowledging the Plaintiff's FOIA request and processing of this request. The Plaintiff has issues with how the Defendant's OCHCO handles FOIA requests (see paragraph 3). The Defendant's actions in this regard are in violation of the Defendant's FOIA internal protocols, and is in violation of 5 U.S.C. § 552 et seq and 28 CFR Part 16. The Defendant's handling of this FOIA request is also found in the Plaintiff's written complaint that was sent to the U. S. Department of Justice on September 26, 2012 (see paragraph 31). The Plaintiff pleads to the COURT for relief in acquiring the respective documents.

36. In conclusion, Plaintiff is now compelled to seek relief from the COURT.

COUNT 1
(Violation of FOIA, 5 U.S.C. § 552)

37. Plaintiff re-alleges paragraphs 1 through 36 as if fully stated herein.

38. Defendant is unlawfully withholding records requested by records requested by the Plaintiff pursuant to 5 U.S.C. § 552.

39. Plaintiff is being irreparably harmed by reason of Defendant's unlawful withholding of the requested public records, and Plaintiff will continue to be irreparably

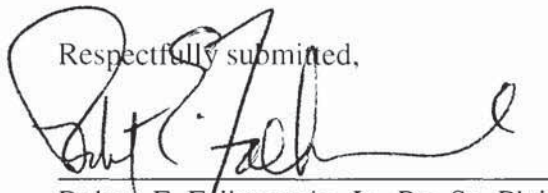
harmful unless Defendant is compelled to conform its conduct to the requirements of law.

WHEREFORE, Plaintiff respectfully requests that the Court: (1) order Defendant to conduct a search for any and all records responsive to Plaintiff's FOIA requests and demonstrate that it employed search methods reasonably likely to lead to the discovery of records responsive to Plaintiff's FOIA requests; (2) order the Defendant to produce, by a date certain, any and all non-exempt records responsive to Plaintiff's FOIA requests and a *Vaughn* index of any responsive records withheld under claim of exemption; (3) enjoin Defendant from continuing to withhold any and all non-exempt records responsive to Plaintiff's FOIA requests; (4) order enjoining the Defendant from relying on invalid regulations or practices in all future FOIA undertakings (*Cf. McGehee v. CIA*, 697 F.2d 1095 (D.C. Cir. 1983)); (5) allow the Plaintiff to proceed in forma pauperis and the Court's filing fee be waived; (6) to declare the Defendants' actions to be violative of FOIA; (7) make specific findings pursuant to the Administrative Procedures Act as violations of the terms of FOIA where the Defendants' actions are so flagrant to be arbitrary and capricious (or an abuse of discretion) where the Court refers this matter to the Merit System Protection Board for investigation pursuant to 5 U.S.C. § 552(a)(4)(F); (8) upon appointment of legal counsel by the Plaintiff that the Court grants the Plaintiff an award for attorneys' fees and other litigation costs reasonably incurred pursuant to 5 U.S.C. § 552(a)(4)(E); (9) at Court's discretion, take any appropriate actions to punish offenders for contempt pursuant to 5 U.S.C. § 552(a)(4)(G); (10) joinder the U.S. Department of Justice as a co-Defendant with the Defendant in this complaint before the COURT as this co-Defendant has jurisdiction over Federal agencies' and entities' compliance with 5 U.S.C. § 552 and has failed through its monitoring to cause the Defendant to comply with the fidelity to the rule of law; and, (11) grant Plaintiff such other relief

as the Court deems just and proper.

Dated: December 13, 2012

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert E. Falkenstein, Jr.", written over a horizontal line.

Robert E. Falkenstein, Jr., Pro Se, Plaintiff
8622 Eagle Glen Terrace
Fairfax Station, VA 22039
Home - (703) 690-2548
Cell - (571) 332-8502
Office - (202) 275-6281